Attorney General of Malaysia v Gapari bin Kitingan

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO K 18 OF 1990
HAIDAR J
16 JUNE 1990

Criminal Procedure — Examination of overseas witness — Application under Rules of the High Court 1980 — Applicability to criminal proceedings — Form of letter — Rules of the High Court 1980, O 39 & O 66

Words and Phrases — 'Matter' — Rules of the High Court 1980, O 39 & O 66

Words and Phrases — 'Causes' — Rules of the High Court 1980, O 39 & O 66

The respondent was on 23 January 1990 charged with seven counts of corruption. On 19 March 1990 the applicant obtained an ex parte order from the High Court under O 39 of the Rules of the High Court 1980 ('the Rules') to record the evidence of five witnesses in Hong Kong. The respondent applied to set aside the order, on the grounds that the Rules do not apply to criminal proceedings, the form of letter was wrong, and that the applicant had not made any attempt to procure the attendance of the witnesses in Malaysia to give evidence.

Held, dismissing the application:

(1) The words 'matter' and 'cause' used in O 39 and O 66 of the Rules include criminal proceedings. Order 39 of the Rules is therefore applicable to criminal proceedings.

(2) A party cannot compel a witness in a foreign country to attend trial since a writ of subpoena would not extend beyond the jurisdiction. Order 39 r 9 of the Rules provide for depositions of witnesses who are beyond the jurisdiction of the court to be receivable in evidence and therefore there is absolutely no necessity for the applicant to show any attempt to procure the foreign witnesses who are indisputably beyond the jurisdiction.

(3) Order 39 r 3 provides for the letter of request to be in Form 76 with such variations as the order may require. In view of the proceedings being criminal in nature, the forms must of necessity vary to suit the particular circumstances of the criminal case.

Cases referred to

1 *Dato Hashim Shamsuddin v A-G, Hongkong* [1986] 2 MLJ 112 (folld)
2 *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 16
Rules of the High Court 1980 O 39, O 66

Ghani Patail (*Ng Aik Guan* with him) for the applicant.
Ronald Khoo (*Simon Shim* with him) for the respondent.

Cur Adv Vult

Haidar J: This is an application by the respondent, Gapari bin Kitingan alias Datuk Dr Jeffrey G Kitingan to set aside the order made by Mohamad Noor J on 19 March 1990. The order was made under O 39 of the Rules of the High Court 1980 ('RHC') on the ex parte application of the Attorney General, Malaysia, the applicant.

On 23 January 1990, criminal proceedings pertaining to seven charges for corruption under s 4 of the Prevention of Corruption Act 1961 (Act No 57) were instituted against the respondent in the sessions court, Kota Kinabalu by the public prosecutor, who is also the Attorney General (see s 376(i) of the Criminal Procedure Code (FMS Cap 6)). On the same day the criminal proceedings were ordered to be transferred to the High Court, Kota Kinabalu on the certificate issued by the public prosecutor under s 418A of the Criminal Procedure Code. The case came for mention on 12 February 1990 in the High Court, Kota Kinabalu wherein it was fixed for hearing from 2 to 31 May 1990. When the case came for hearing on 2 May it was adjourned to 11 August 1990 for mention at the request of the applicant in order that evidence of five witnesses in Hongkong may be recorded by virtue of the order obtained by the applicant on 19 March 1990. The respondent did not object to the application for adjournment.

The prosecution requires the evidence of five witnesses from Hongkong in respect of the criminal case against the respondent and as these witnesses are outside our jurisdiction, an ex parte application was made by the applicant under O 39 of the RHC vide Originating Summons No K 18 of 1990 and an order was granted accordingly and hence this present application by the respondent to set it aside.

The main thrust of the argument of Mr Ronald Khoo, counsel for the respondent, is that the RHC, in particular O 39, does not apply to criminal proceedings and he sought to draw a distinction between this case and the case of *Dato Hashim Shamsuddin v A-G, Hongkong*.[1] *Dato Hashim*'s case[1] in my view, is about the only case that may be relevant to consider on the issue of whether the RHC or part thereof is applicable or otherwise to criminal proceedings when the Supreme Court considered O 66 of the RHC. I do not think I need to go as far as England or India for authorities as urged by Mr Ronald Khoo. The position of *Dato Hashim*'s case[1] is the reverse of the present case. The Supreme Court by a majority judgment held 'Order 66 of the Rules of the High Court 1980 is valid and properly enacted in relation to both civil and criminal proceedings and therefore the order made in this case is intra vires'. The issue is narrowed down as to whether the applicant can invoke O 39 of the RHC particularly r 2 as in this case?

It is true that the Supreme Court only considered O 66 of the RHC in *Dato Hashim*'s case[1] whereas in this case I have to consider O 39 and its effect in respect of criminal proceedings. Be that as it may, Abdoolcader SCJ extensively considered s 16 of the Courts of Judicature Act 1964 ('CJA') vis-a-vis the relevant provisions of the RHC and in my view, the judgment is definitely relevant and of

considerable assistance for my consideration of O 39 and its application to the present case.

Order 39 r 1 provides for the taking of evidence within jurisdiction before a trial of a witness who is expected to be unable to attend it whereas O 39 r 2 provides for a witness to be examined who is out of jurisdiction. Order 39 r 1 reads:

> The Court may, *in any cause or matter* where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

Whereas O 39 r 2(1) reads:

> Where the person in relation to whom an order under rule 1 is required *is out of jurisdiction*, an application may be made
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> (a) for an order in Form 74 under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or
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> (b) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order in Form 75 under that rule appointing a special examiner to take the evidence of that person in that country. (Emphasis added.)

The words 'matter' and 'cause' are used both in O 39 and O 66. Abdoolcader SCJ at p 122 said:

> The phrase 'in relation to a matter' in r 1(1) of O 66 ineluctably connotes the application of that Order to criminal as well as civil matter, as, although 'matter' is not defined in the RHC, the latter were enacted under the Courts of Judicature Act 1964 ('the 1964 Act') and constitute subsidiary legislation thereunder, and *the definition of 'matter' read with, that of 'proceeding' in s 3 of the 1964 Act which clearly includes criminal proceedings applies equally to the provisions of the RHC by virtue of s 21(1) of the Interpretation Act 1967 (which applies thereto pursuant to s 2(1)(e) thereof) which provides that terms and expressions used in subsidiary legislation have the same meaning as in the written law under which it was made.* (Emphasis added.)

The effect of O 1 r 2(2) and (3) was adequately considered and dwelt on by Abdoolcader SCJ also where his Lordship said at p 122:

> I would emphasize that O 1 r 2(3) in specifically providing an exception to the provisions of para (2) of that rule categorically *permits the application of the RHC or any provisions thereof* in relation to the proceedings specified in para (2) of r 2. (Emphasis added.)

It would seem clear to me that O 39 is applicable to criminal proceedings.

As to the submission of Mr Ronald Khoo in regard to the question of the statutory source or enabling provision for the enactment of O 39, the short answer can be found in the judgment of Abdoolcader SCJ at pp 122-123, though it relates to O 66, but in my view, the same reasoning equally applies to O 39 as to construe otherwise would be fallacious.

Mr Ronald Khoo went on to argue that even assuming O 39 is applicable in criminal proceedings, there is, according to him, not an iota of evidence to show that some attempt has been made to procure attendance of the witnesses in our jurisdiction to give evidence at the criminal trial against the respondent and as such there was no sufficient justification for deviation from the normal practice of examining witnesses in court. According to *Mallal's Supreme Court Practice* at p 460:

> A party cannot compel a witness in a foreign country to attend trial since a writ of subpoena ad testificandum does not extend beyond jurisdiction. To obtain the evidence of a witness who is unable or unwilling to attend the trial, the court may make an order for his examination abroad, if satisfied that the application was made bona fide and with such promptitude so as not to cause unreasonable delay and the evidence of the witness is relevant and material to the issue and could not be obtained otherwise.

In fact according to O 38 under the caption 'Evidence: General', r 9 provides for depositions of witnesses who are beyond the jurisdiction of the court to be receivable in evidence and therefore there is absolutely no necessity for the applicant to show attempt to procure the five witnesses who are indisputably beyond our jurisdiction. However, there is a safety valve where under para 2 of r 9 the applicant intending to use any deposition in evidence at the trial of a cause or matter must, a reasonable time before trial, give notice of his intention to do so to the respondent. Even in the letter of request to the Hong Kong authorities, there is a request that the respondent or such of them be allowed to cross-examine the witnesses that may be produced on behalf of the applicant. Where then is the injustice that may be caused to the respondent? From a perusal of the ex parte application of the applicant, I am more than satisfied and so must be Mohamad Noor J that the evidence of the five witnesses are relevant and material to the issue and could not be obtained otherwise. The allegation of fishing therefore has no substance at all.

As to the deviation in the forms used, I need only refer to the then Federal Court case of *TR Hamzah & Yeang Sdn Bhd* v *Lazar Sdn Bhd*[2] relied on by the applicant. In the said case, Lee Hun Hoe CJ (Borneo) said at p 54.

> The appellant took objection to the form of the order as it was contrary to O 29 r 1(4) of the Rules of the High Court 1980 which provides that 'An order for interim injunction must be in Form 58'. He referred to the *Supreme Court Practice 1982* and cited *Gebruder Naf* v *Ploton* (1890) 25 QBD 13 and *Morgan* v *Greatrex* (1884) WN 21. We think in the circumstances his objection is without substance. Order 1 r 7 of the Rules of the High Court 1980 is clear and states that:
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> > 'The forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require.'
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> The English O 1 r 9(1) of the *Supreme Court Practice 1982* is practically word for word the same as our O 1 r 7 except for

our 'Appendix A', the English uses 'Appendices'. The *Supreme Court Practice 1982*, Vol 1, at p 9 under the effect of the rule it is stated:

> 'The need for these prescribed forms is to ensure, so far as possible, uniformity and conformity in the practice and procedure of the High Court. They must be used whenever applicable, but nevertheless a certain latitude is permitted, so that these forms are allowed to be used 'with such variations as the circumstances of the particular case require'. This latitude is intended to mitigate excessive formality and technicality, when a variation to meet the requirements of a particular case would make the form more valuable and suitable as an instrument to achieve the real objective of the form ...'

The learned Chief Justice went on to quote a passage from *Mallal's Supreme Court Practice* (2nd Ed) at p 7.

I observe that O 39 r 3(2) of the RHC itself provides for the letter of request to be in Form 76 *with such variations as the order may require*. In view of the proceedings being criminal in nature, the forms must of necessity vary to suit the particular circumstances of the criminal case pending before this court and the objection of Mr Ronald Khoo on the variations in the forms cannot be sustained.

On the issue of the admissibility of the depositions at the criminal trial raised by Mr Ronald Khoo, in my view, even if there is merit in such a contention it is premature to raise it at this stage. The steps taken by the applicant for the present moment are purely to record evidence of certain witnesses in Hong Kong. Now, whether there is a similar provision as our O 66 of the RHC in the Hong Kong legislation and the admissibility of certain evidence over there is a matter for the applicant to consider and I am sure the applicant knows what he is doing otherwise it will be an exercise in futility.

In the circumstances I am of the view that the applicant can resort to O 39 of the RHC in this case and the order was rightly granted. The application of the respondent is dismissed with costs.

Application dismissed.

Solicitors: *Shim Pang & Co.*

Reported by *Mathavan Devadas*

Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP KOD D4-28-562-89
ZAKARIA YATIM J
12 JUNE 1990

Companies and Corporations — Winding up — Undue preference — Payment made by respondent to one creditor while petition is pending — Whether undue preference — Whether transaction could be validated — Companies Act 1965, s 223

In this petition the petitioner is seeking the order of the court to wind up the respondent on the ground that the respondent is unable to pay its debts. A sum of $50,000 had been paid by the respondent to one supporting creditor in settlement of the debt. The respondent had also transferred a piece of land to the creditor. The petitioner contended that this was an undue preference of one creditor over another after the petition had been presented and therefore contrary to ss 223 and 293 of the Companies Act 1965.

Held, ordering that the money paid to the supporting creditor be returned to the company:

(1) The payment of the $50,000 by the respondent to one supporting creditor as well as the transfer of the piece of property of the respondent to the creditor were dispositions of the property of the respondent to the creditor after the winding-up petition had been presented and such dispositions are contrary to s 223 of the Companies Act 1965 and therefore void.

(2) The question of validating a transaction is at the discretion of the court but a person who seeks such an order must make an application for such an order. In the present case there is no such application. In any event even if there is an application, this is no proper case for the court to make such an order. If a validating order is made, the preferred creditor would be paid a substantial sum of money at the expense of the other creditors.

Cases referred to

1 *Re Miles Aircraft Ltd* [1948] 1 Ch 188 (not folld)
2 *Re AI Levy (Holdings) Ltd* [1964] 1 Ch 19 (refd)
3 *Re Wiltshire Iron Co* (1868) 3 Ch App 443 (refd)
4 *Re Clifton Place Garage Ltd* [1970] Ch 477 (refd)
5 *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (refd)
6 *Commonwealth Industrial Gases Ltd* v *Dorcon Constructions Pty Ltd* (1988) 14 ACLR 201 (refd)
7 *Lian Keow Sdn Bhd & Ors (In Liquidation) & Anor* v *Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (folld)
8 *Datin Hajjah Zaleha & Ors* v *Perkasa Trading Sdn Bhd & Anor* [1984] 1 MLJ 372 (refd)

Legislation referred to

Companies Act 1965 s 223

Gurubachan Singh for the petitioner.
KY Leong for the respondent.

Cur Adv Vult

Zakaria Yatim J: In this petition the petitioner, Kimoyama Elektrik (M) Sdn Bhd is seeking the order of the court to wind up the respondent company, Metrobilt Construction Sdn Bhd (hereinafter referred to as 'the company') on the ground that the company is unable to pay its debts.